

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALIDA BILBREY

Claimant

VS.

U.S.D. 443

Respondent

AND

**KANSAS ASSOCIATION OF SCHOOL
BOARDS and THE HARTFORD**

Insurance Carriers

Docket No. 1,007,546

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier, The Hartford, (respondent) requested review of the December 30, 2009, Post Award Medical Decision entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on April 6, 2010. W. Walter Craig, of Derby, Kansas, appeared for claimant. Richard L. Friedeman, of Great Bend, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) granted claimant's request for a change of authorized treating physician and ordered respondent to provide claimant with a list of three physicians that specialize in pain management, from which she could choose one. Claimant's request for payment of attorney fees in the amount of \$2,550 was granted, but her request for reimbursement of a deposition cancellation fee was denied.¹

¹ The ALJ also denied claimant's request for payment of medical bills and prescriptions incurred for treatment rendered by Dr. Snodgrass because that was not requested in the application for post award medical.

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties stipulated that the Board should also consider the medical records of Dr. Fan itemized in and attached to the letter from counsel dated April 6, 2010.

ISSUES

Respondent requests review of the ALJ's order granting claimant a change of physician when there was no evidence in the record that the authorized treating physician was unsatisfactory. Respondent further contends that claimant's attorney is not entitled to attorney fees in this matter because his proffered evidence was untrue and because he did not submit an itemized billing.

Claimant contends respondent should pay the fee charged by Dr. Abay when his deposition was cancelled. Claimant acknowledges that expert witness fees incurred by claimant are to be paid by claimant. However, claimant argues she was forced to schedule the deposition of Dr. Eustaquio Abay II to get his medical report into the record, and then respondent stipulated to the admission of the report the day before the scheduled deposition.

The issues for the Board's review are:

- (1) Is claimant entitled to a change of physician?
- (2) Is claimant's attorney entitled to payment of his attorney fees by respondent?
- (3) Is claimant entitled to be reimbursed for a cancellation fee for the deposition of Dr. Abay?

FINDINGS OF FACT

On October 18, 2005, the ALJ entered an Award finding that claimant had a 5 percent functional impairment to her body as a whole for injuries to her low back suffered in an accident that occurred on June 20, 2002. The ALJ found that claimant sustained an accidental injury on October 3, 2002, but had no additional permanent impairment as a result of that accident. Although claimant claimed injuries to her left knee in the accidents and at least two physicians, Dr. Raymundo Villanueva and Dr. Pedro Murati, gave impairment ratings for her knee injuries, the ALJ did not award claimant a disability for her left lower extremity.

In the Award, the ALJ stated: "It should be noted that all the physicians recognize that the claimant will need continued medical care for pain management."² Future medical was awarded upon proper application and approval by the Director.

On January 27, 2006, an Agreed Order was entered by the ALJ in which Dr. Villanueva was authorized to be claimant's treating physician for providing post award medical care to claimant. Later, claimant's care was transferred to Dr. Paul Bassett and then to Dr. John Fan.

Dr. Fan first saw claimant on November 3, 2008, at which time he ordered a lumbar spine MRI and continued the medication regimen she had been on with Drs. Villanueva and Bassett. On that date, claimant and Dr. Fan also entered into a Patient-Physician Opioid Therapy Agreement. Dr. Fan followed up with claimant in December 2008. In January 2009, Dr. Fan recommended claimant have a nerve block injection. Dr. Fan's medical records for April 2, 2009, indicate that he saw claimant on that date, that she had missed her last appointment, and that she had taken her last dose of OxyContin and Opana on March 18, 2009, with no withdrawal symptoms. Claimant reported she had three epidural injections which made her pain worse. Although claimant complained that she was in a lot of pain, Dr. Fan did not prescribe pain medication. He did, however, prescribe a TENS unit. The last time claimant was seen by Dr. Fan was on May 5, 2009, at which time he referred claimant to Dr. Abay for a surgical consultation. Dr. Fan's medical record of May 5, 2009, states: "Follow up appointment scheduled on an as needed basis in the future."³

Claimant saw Dr. Abay on May 28, 2009. He recommended claimant have conservative treatment while further diagnostic testing was done to evaluate her symptoms. He recommended she undergo x-rays of the thoracic and lumbar spine and left hip, but did not recommend neurosurgery at that time.

On July 20, 2009, claimant filed an Application for Post Award Medical asking for a change of physician. At the post award medical hearing, the claimant was present and sworn in to testify. Nevertheless, no testimony was taken from her. Instead, her attorney proffered her testimony, stating: "And the claimant's testimony is going to be, if I can proffer it, is that she has tried to return to Dr. Fan but he won't see her anymore."⁴ Because of this, claimant sought additional treatment on her own with Dr. Snodgrass.⁵

² ALJ Award (Oct. 18, 2005) at 5.

³ Post Award Medical hearing Trans. (Oct. 7, 2009), Cl. Ex. 2 at 1.

⁴ Post Award Medical hearing Trans. (Oct. 7, 2009) at 8.

⁵ Post Award Medical hearing Trans. (Oct. 7, 2009) at 9.

Claimant asked that Dr. David Hufford be authorized to treat claimant's ongoing back and knee conditions.

At the October 7, 2009, hearing, after claimant's counsel proffered that Dr. Fan would not see claimant, counsel for respondent announced that he would attempt to schedule an appointment for claimant with Dr. Fan. That was later done, and claimant returned to see Dr. Fan on November 19, 2009. The office notes for that visit are not in the record, but Dr. Fan did complete a work status form noting that claimant was unable to work. Another such form was completed by Dr. Fan on December 23, 2009. On March 10, 2010, Dr. Fan's office was notified that claimant had filled a prescription from Dr. Snodgrass for Hydrocodone on February 19, 2010. This was a breach of the contract claimant signed with Dr. Fan. On that same date, Dr. Fan sent claimant a letter "withdrawing from further professional attendance upon you" and suggesting she place herself under the care of another physician without delay.

Dr. David Hufford, who is a board certified independent medical examiner and is board certified in family medicine, examined claimant on June 25, 2009, at the request of claimant's attorney. After his examination, he diagnosed claimant with mild degenerative disc disease that was aggravated by a work-related fall causing chronic low back pain. He believed also that she incurred a twisting injury to her left knee and was suspicious that she had a meniscal tear. He opined that in regard to claimant's back, she was at maximum medical improvement and had been for a significant length of time. It was his opinion that she should be in chronic pain management.

Dr. Hufford was less certain about claimant's left knee injury. He admitted that he initially did not have a complete picture of the history of her knee condition, but based upon his examination he suspected she had a meniscal tear. After reviewing the results of an MRI of claimant's left knee done in June 2003 and the report of Dr. Abay, Dr. Hufford testified he felt that claimant should have conservative treatment of the knee, to include a corticosteroid injection and possibly a series of viscous supplementation. Then, if claimant remained symptomatic, another MRI should be done to see if a meniscal tear was present that had not been detected in the initial MRI. If a meniscal tear is found in a subsequent MRI, arthroscopic surgery on the knee could be performed. Dr. Hufford said that approximately 10 percent of the time, a meniscal tear is found during surgery that had not been detected on an MRI.

Claimant noticed respondent's attorney that she would be taking Dr. Abay's deposition on November 10, 2009. In her brief to the Board, claimant contends that the day before the scheduled deposition, respondent's attorney agreed to stipulate that the report of Dr. Abay could be entered as part of the record. A Stipulation of the Parties was filed on November 30, 2009, agreeing to the medical record of Dr. Abay dated May 28, 2009, without the need for laying foundation.

PRINCIPLES OF LAW AND ANALYSIS

(1) Is claimant entitled to a change of physician?

K.S.A. 2009 Supp. 44-510k(a) states:

At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

K.S.A. 44-510h(b)(1) states:

If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider.

The ALJ found:

It is clear that since the claimant's Award was issued in October of 2005, she has sought and received pain management for her chronic pain until it was apparently terminated by Dr. Fan when the claimant was referred to Dr. Abay for an evaluation. The records are unclear as to why the claimant did not continue to receive prescription pain medication. The records were clear that while receiving the medication, she received significant pain relief and improved function. What is also clear is that once the claimant no longer had medication, her pain level was a 10 out of 10 most of the time. Therefore, it is found that the claimant is entitled to a change of authorized treating physician from Dr. Fan, pursuant to K.S.A. 44-

510h(b)(1). That the respondent shall provide the claimant with a list of three (3) physicians specializing in pain management, to choose from.⁶

The Board agrees that claimant is in need of a physician to provide treatment, including pain management, and to monitor her medications. Dr. Fan is unwilling to continue as claimant's authorized treating physician. Therefore, respondent shall provide claimant with a list of three physicians specializing in pain management from which claimant is to select one to be her authorized treating health care provider.

(2) Is claimant's attorney entitled to payment of his attorney fees by respondent?

K.S.A. 44-536(g) states:

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. . . . If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.

The ALJ ordered:

Claimant's counsel is entitled to payment of attorney fees in the sum of \$2,550.00.

Counsel requested payment for 17 hours at the rate of \$150.00 per hour. The hourly rate is found to be reasonable. The 17 hours spent was contained in the submission letter and unfortunately these were not broken out. Therefore, this court reviewed the file and determined that 17 hours is a reasonable amount of time to be spent for litigation of this issue especially when travel time is included. Therefore counsel's request for payment of attorney fees will be granted in the sum of \$2,550.00.⁷

⁶ ALJ's Post Award Medical Decision (Dec. 30, 2009) at 3.

⁷ ALJ's Post Award Medical Decision (Dec. 30, 2009) at 3-4.

There was no discussion of attorney fees at the October 7, 2009, hearing. In his Submission Letter to the ALJ dated November 19, 2009, counsel for claimant requested "Post Award attorney fees for 17 hours at the rate of \$150.00 per hour be ordered paid in the amount of \$2,550.00."⁸ There was no itemization of how those 17 hours were spent. Respondent, in its submission letter dated December 17, 2009, argued that claimant should not receive any attorney fees because her post award request for a change of physician was without merit. Respondent did not dispute the number of hours claimant's attorney represented he spent on the matter, nor did respondent dispute the hourly rate requested. Respondent did not request that there be a hearing on the claimant's request for attorney fees.

The Board finds that claimant's counsel rendered services to claimant subsequent to the ultimate disposition of the original claim. Those services did not result in an award of additional disability compensation. Instead, it resulted in medical treatment benefits, specifically, a change of physician. Claimant filed her post award motion because she believed that Dr. Fan was no longer willing to see her. Whether or not that was true at the time of her motion, ultimately it became true. There is a dispute concerning whether Dr. Fan was willing to continue prescribing the narcotic pain medications claimant had been receiving. This may have been a misunderstanding or miscommunication between claimant and Dr. Fan. Nevertheless, it led to claimant seeking a prescription from another physician, which was a violation of the contract between claimant and Dr. Fan. This resulted in a severance of the physician/patient relationship. That relationship, however, was already strained and may have already been beyond repair. Trust is an important part of the physician/patient relationship, and there is little to be gained by forcing a patient to continue with a physician after that trust is gone.

Although some of these facts developed after claimant filed her request for a change of physician and some even after the hearing on that request, the Board finds that claimant has met her burden of proving a need for a change of physician and her request was not without merit. Claimant is entitled to an award of attorney fees. The amount of the fees awarded by the ALJ is not disputed. The Board finds the amount to be reasonable.

(3) Is claimant entitled to be reimbursed for a cancellation fee for the deposition of Dr. Abay?

K.S.A. 2009 Supp. 44-510k(c) states:

The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments thereto. As used in this subsection, "costs" include, but are not limited to, witness

⁸ Claimant's Submission Letter filed Dec. 28, 2009) at 5.

fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.

In *Higgins*,⁹ the Kansas Supreme Court recently stated: “K.S.A. 2008 Supp. 44-510k(c) does not permit an administrative law judge to grant a workers compensation claimant expert witness fees, when such fees have been incurred in the pursuit of post-award medical benefits.”

The ALJ denied claimant’s request that respondent be ordered to reimburse her the \$150 deposition cancellation fee charged by Dr. Abay. The ALJ reasoned:

Case law had held that expert witness fees incurred by the claimant are to be paid by the claimant. The claimant scheduled this deposition and had it gone forward, the fees would have exceeded the \$150.00 cancellation fee. Although it is true that the respondent could have agreed earlier to the admission of Dr. Abay’s records and no deposition would have been scheduled, they should not be punished for agreeing to the admission at a later date which did allow and result in the cancellation. This resulted in the \$150.00 cancellation fee but also resulted in the claimant not having to pay an expert witness fee.¹⁰

The Board agrees with the ALJ. The Kansas Supreme Court’s decision in *Higgins* precludes such an order.

CONCLUSION

(1) Claimant is entitled to a change of physician. Respondent shall provide claimant with a list of three physicians specializing in pain management from which claimant is to select one to be her authorized treating health care provider.

(2) Claimant’s attorney is entitled to payment of his attorney fees by respondent. The amount awarded by the ALJ is reasonable for the services rendered.

(3) Claimant is not entitled to be reimbursed for the cancellation fee for the deposition of Dr. Abay.

⁹ *Higgins v. Abilene Machine, Inc.*, 288 Kan. 359, Syl., 204 P.3d 1156 (2009).

¹⁰ ALJ’s Post Award Medical Decision (Dec. 30, 2009) at 3.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated December 30, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier The
Hartford
Pamela J. Fuller, Administrative Law Judge